

## FAX TRANSMITTAL

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Fax: (415) 703-4664TO: LORETTA YOUNG DOE OFFICE OF ADVOCACYFAX NO.: 202 586-6010NO. OF PAGES INCL. COVER SHEET 4FROM: RICHARD GANNON, ADMINISTRATIVE DIRECTOR, DWCDATE: 11-8-01COMMENTS: HARD COPIES to follow by mail.E-mail also being sent to loretta.young@eh.doe.govAny questions - contact Glenn Shor @ 415-703-4679  
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**STATE OF CALIFORNIA**

Gray Davis, Governor

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DIVISION OF WORKERS' COMPENSATION**

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November 2, 2001

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**Re: Comments on DOE Regulations regarding Subtitle D of the Energy  
Employees Occupational Illness Compensation Program Act of 2000**

Dear Ms. Young,

Below are our comments on proposed regulations which appeared in the Federal Register on September 7, 2001 (66 FR 46742) outlining the processes and procedures the Department of Energy proposes to use to implement Subtitle D of the Energy Employees Occupational Illness Compensation Program Act of 2000.

**Background:**

The Department of Energy (DOE) is proposing procedures to implement Subtitle D of the Energy Employees Occupational Illness Compensation Program Act of 2000 under which a DOE contractor employee or the employee's estate can seek assistance from the DOE Program Office in filing a claim with the appropriate State workers' compensation system based on an illness or death caused by exposure to a toxic substance during the course of employment at a DOE facility.

DOE defines the purpose of the proposed regulations as dealing with: "...how: (1) an individual may submit an application to the Program Office for review and assistance; (2) the Program Office determines whether to submit an application to a physicians panel; (3) physicians panels determine whether the illness or death of a DOE contract employee arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility; (4) the Program Office accepts or rejects a determination by a physicians panel; and (5) appeals may be undertaken."

**Suggested comments:**

The EEOICP was created to reverse decades-old policies of delay and denial of injury and illness claims related to exposures at Department of Energy facilities and contractors. In the passage of the law, and in particular under Subtitle D, the Congress committed to seeing that those contractor employees whose illness or death was caused by such employment-related exposure would be given assistance by the Department of Energy in filing claims under the applicable state workers' compensation laws, and that the Energy Secretary would direct DOE contractors to not oppose valid claims.

Proposed rules issued by the Secretary do not accomplish this legislative intent. Subtitle D of the Act directs the Secretary of Energy to enter into agreements with states to provide assistance to DOE contractor employees in filing claims under that state's workers' compensation system. Under many state laws, including California's, disputes between parties to a claim may be brought to the state agency for review. However, when there are agreements between employer and employee that a claim is valid in that the illness or death was caused by the specific occupational exposure, the state is not obligated to raise other procedural or judicial obstacles that might otherwise keep the claim from progressing. The Act in effect directs DOE contractors not to raise possible defenses in contesting claims. Where there is no dispute between employer and employee on the validity of a claim, the state need not attempt to create a reason to block the claim. Quite the contrary, the state should attempt to be part of a solution that addresses the income and medical care needs of those injured on the job at DOE contractor facilities. The role of the state agency should be to facilitate and expedite compensation, not be an obstacle to it.

Further, the rules promulgated by the Secretary should not attempt to put Department of Energy employees into the role of interpreting state laws as to whether a claim is likely to be eligible under state law. In section 852.6, DOE proposes to compel states to include specific provisions in the MOUs that would have DOE Program office personnel involved in determining whether to submit an application to a physician panel for determination of medical causation. DOE's interpretation of the proposed section is as follows:

Proposed section 852.6 provides for three standard provisions in State Agreements which are subject to negotiation. First, a State will identify the applicable criteria used to determine the validity of a workers' compensation claim under State law and describe how those criteria are applied in a State worker's compensation proceeding. Second, only those applications that satisfy the identified applicable criteria law will be submitted to a physicians panel. And third, the Program Office will provide assistance to only those applications that meet the identified applicable criteria.

The proposed rules go beyond legislative direction. Claims by any DOE employee or contractor employee whose employment at a covered DOE facility is verified and who is claiming an injury that may be due to toxic exposure at that job should be sent to a physician panel, established under the Act, to allow the panel to determine if the illness is

causally related to the exposure. Should the panel make a positive determination of causality, then DOE should direct the contractor not to contest the claim, and payment should be made. There is nothing in the law that says that DOE program personnel should attempt to determine which cases do and don't meet specific criteria. The law allows there to be different payments to valid claims determined by the state in which the illness was caused, but DOE should not be involved in determining whether any individual claim meets an individual state's criteria for compensation and thereby qualifies to be seen by a physician panel.

In general, the State Agreements called for under the statute should be used in a manner to assist the states in helping workers obtain evidence to meet the evidentiary demands of their cases. Section 3661(e) of the Act directs the Secretary to assist applicants whose cases have been approved by a physician panel to file a claim under the appropriate State workers' compensation program. State agreements should include provisions for DOE to assist state agencies in promoting information and understanding about the program to potentially eligible claimants. Such assistance should include resources in the form of training and materials that are made available to state ombudsman or information and assistance functions.

The Energy Employees Compensation Act was a far-reaching attempt to justly compensate workers hurt on DOE weapons program contractor sites. The rules implementing the DOE response to such claims should be used to help facilitate their compensation rather than continue to restrict access.

Thank you for the opportunity to comment on these proposed regulations. The California Division of Workers' Compensation stands ready to work along with the Department of Energy to assure that workers injured on the job receive just and timely compensation.

Sincerely yours,



Richard Gannon  
Administrative Director